

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE CITY OF ST. PAUL

In the Matter of the All Licenses Held
By Blue Store St. Paul d/b/a Blue Store
St. Paul

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Raymond R. Krause (ALJ) on August 23, 2011, at the Ramsey County Courthouse, 15 West Kellogg Boulevard, St. Paul, Minnesota. The hearing was held pursuant to a Notice of Administrative Hearing dated August 2, 2011.

Kyle Lundgren, Assistant City Attorney, appeared on behalf of the City of St. Paul (the City). Talib Al-Tamar, owner of the Blue Store St. Paul (the Blue Store or Licensee), appeared without counsel. Kristina Schweinler and Christine Rozek also were present as witnesses. Also testifying was Talib Al-Tamar. Exhibits 1-5 were accepted into evidence. The Office of Administrative Hearings record closed at the end of the hearing.

STATEMENT OF THE ISSUES

1. Did the City prove by a preponderance of the evidence that a cigarette was being smoked by an employee of the Blue Store within the premises of the establishment on June 30, 2011, in violation of Minn. Stat. § 144.414, subd. 1 (Minnesota Clean Indoor Air Act)?
2. Is the recommended penalty of \$500.00 reasonable pursuant to Saint Paul Legislative Code § 310.05 (m) (3)?

The ALJ finds that the City did show by a preponderance of the evidence that a cigarette was being smoked on the premises that day and was most likely smoked by an employee. The ALJ also finds that the proposed penalty is within the standard penalty matrix for a first time offense.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Licensee is the holder of a Retail Food license, a Cigarette/Tobacco license and an Alarm Permit. The contact for these licenses is the owner, Talib Al-

Tamar (the Owner). The licensee is a convenience store located at 879 Fremont Avenue, St. Paul.¹

2. Licensee has passed several cigarette/tobacco compliance checks in the past and has no other violations on its record.²

3. The St. Paul Department of Safety and Inspections (the Department) routinely conducts tobacco compliance checks of businesses holding a cigarette/tobacco license. The compliance check process involves the use of an underage decoy that has been trained by the Department. The decoy enters the premises with a valid ID and attempts to make a tobacco purchase. If successful or if denied, the decoy then reports to a Department inspector waiting nearby. If the purchase was made, the inspector then enters the licensed premises and takes down the relevant information from the offending clerk. Decoys are not identified in subsequent actions for safety and privacy reasons.³

4. On June 30, 2011, a tobacco compliance check was conducted at the licensee's premises. An unidentified, underage decoy went into the store and attempted to purchase cigarettes. The clerk requested identification, determined that the decoy was underage and denied the purchase. The decoy left the store.⁴

5. Upon leaving the store, the decoy reported to Kristina Schweinler (the Inspector) who was waiting outside the store. Ms. Schweinler is a Senior License Inspector for the St. Paul Department of Safety and Inspections.

6. The decoy told Ms. Schweinler that the attempt to make a purchase was unsuccessful but that he saw the clerk smoking a cigarette behind the counter.⁵ He further stated that he saw the cigarette in the clerk's mouth.⁶

7. Ms. Schweinler entered the store and confronted the clerk with the decoy's accusation. Upon entering the store, Ms. Schweinler smelled tobacco smoke. The clerk denied smoking. Ms. Schweinler went behind the counter and observed a lit, partially smoked cigarette on the counter. The clerk said that "he was going to go outside but that it was too busy."⁷ Ms. Schweinler interpreted that statement to mean that the cigarette was his and that he had been smoking inside because he was too busy to smoke outside.⁸ She then wrote up the violation and filed it with the Department according to normal procedure.

¹ Exs. 1-2, 1-3, 1-4.

² *Id.*

³ Testimony of Kristina Schweinler.

⁴ Test. of K. Schweinler.

⁵ Ex. 1-1.

⁶ Ex. 2-2.

⁷ *Id.*

⁸ Test. of Schweinler.

8. The Licensee's clerk that day was Mr. Abu-Saleh (the clerk).⁹ Mr. Abu-Saleh has limited English language skills.¹⁰

9. The Blue Store has security surveillance camera equipment. The equipment has a limited time in which to view recorded events before the tape is no longer useable for that day. Subsequent to June 30, 2011, Licensee has installed a new system that allows for viewing events for a longer period after they have taken place. The tape for June 30, 2011, is no longer available for review.¹¹

10. The clerk called Mr. Al-Tamar immediately after the Inspector and the decoy left the premises. Mr. Al-Tamar came to the Blue Store, interviewed the clerk and viewed the recording from the video camera. The clerk told Mr. Al-Tamar that he is a non-smoker and was not smoking in the Blue Store that day. He said that a customer had entered the store with a lit cigarette and he told the customer to take the cigarette outside. The customer said he was in too big of a hurry and gave the cigarette to the clerk. The clerk told Mr. Al-Tamar that he intended to take the cigarette outside at the rear of the store to dispose of it. However, at that moment the decoy entered the store and attempted to purchase cigarettes. He therefore, had no time to dispose of the lit cigarette. The cigarette was still lit, he told Mr. Al-Tamar, because there is no ashtray behind the counter. The Blue Store policy is not to have ashtrays because no one is supposed to be smoking there.¹²

11. Mr. Al-Tamar reviewed the security camera tape and was satisfied that his clerk was telling the truth.¹³

12. On July 7, 2011, the Department sent Mr. Al-Tamar a Notice of Violation, notifying him of the incident and that the Department was recommending a \$500.00 fine. The Notice also informed Mr. Al-Tamar of his rights to appeal.¹⁴

13. Mr. Al-Tamar timely notified the Department of his desire to appeal the violation and requested an administrative hearing.¹⁵

14. On August 2, 2011, the Department sent a Notice of Administrative Hearing to Mr. Al-Tamar.¹⁶

Based on these Findings of Fact, the Administrative Law Judge makes the following:

⁹ Ex. 2-2.

¹⁰ Testimony of Talib Al-Tamar.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Ex. 3.

¹⁵ Ex. 4.

¹⁶ Ex. 5.

CONCLUSIONS

1. This matter is properly before the City and the ALJ pursuant to St. Paul Legislative Code §§ 310.05, 310.06 and 324.11.
2. The City complied with all requirements of regulation and gave proper and timely notice to the Licensee.
3. Minn. Stat. §144.414, subd. 1, prohibits smoking in public places, places of employment, public transportation, and public meetings.
4. St. Paul Legislative Code §310.06, sub. (b) (6) (a), permits adverse action against a license if “(t)he licensee or applicant has violated, or performed any act which is a violation of, any of the provisions of these chapters or of any statute, ordinance or regulation reasonably related to the licensed activity, regardless of whether criminal charges have or have not been brought in connection therewith.”
5. The City has proven by a preponderance of the evidence that an employee of Licensee smoked a cigarette on the premises on June 30, 2011.
6. Smoking a cigarette within a public place is a violation of Minn. Stat. § 144.414, subd. 1. It is a violation that is reasonably related to the licensed activity, and is, therefore, a violation of St. Paul Legislative Code § 310.06, sub. (b) (6) (a).
7. This is a first offense for Licensee. The recommended penalty for a first offense is \$500.00 pursuant to the penalty matrix contained in St. Paul Legislative Code § 310.05 (m).

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge respectfully recommends that: the St. Paul City Council impose a fine or take other appropriate adverse action.

Dated: August 30, 2011

s/Raymond R. Krause

RAYMOND R. KRAUSE
Chief Administrative Law Judge

Reported: Digitally recorded

NOTICE

This report is a recommendation, not a final decision. The St. Paul City Council will make the final decision after reviewing the record and may adopt, reject or modify the Findings of Fact, Conclusions and Recommendation contained herein. Pursuant to Section 310.05 of the St. Paul Legislative Code, the City Council's final decision shall not be made until this Report has been made available to the parties to the proceeding and the Licensee has been provided an opportunity to present oral or written arguments alleging error on the part of the Administrative Law Judge in the application of the law or the interpretation of the facts and an opportunity to present argument relating to any recommended adverse action. The Licensee and any interested parties should contact Shari Moore, Saint Paul City Clerk, 290 City Hall, 15 West Kellogg Boulevard, St. Paul, MN 55102, to ascertain the procedure for presenting argument.

MEMORANDUM

During a routine, tobacco compliance check an underage decoy attempted to make a purchase of cigarettes at the Blue Store. The clerk on duty checked the decoy's ID, determined that he was underage, and denied the decoy's request. The unidentified decoy did not appear at the hearing or provide first hand testimony. He allegedly told the Inspector he saw the clerk smoking behind the counter. He said he saw the cigarette in the clerk's mouth.

The Inspector came in the store, saw the cigarette, smelled the smoke, and confronted the clerk. The clerk's response was ambiguous. He said he had been too busy to go out back with it. This could be interpreted to fit the meaning placed on it by the Inspector; that he had been smoking it inside because he was too busy to smoke it outside. It could also be interpreted to fit the meaning placed on the statement by Mr. Al-Tamar; that the clerk had seized the cigarette from a customer and was going to take it out back to dispose of it since there was no ashtray inside. However, before he could do so, the decoy appeared and saw the lit cigarette.

The statements of both the decoy and the clerk are hearsay evidence. Hearsay evidence can be admitted in an administrative hearing but the ALJ must decide if it is reliable enough to be admitted and if so, how much weight to give that evidence.¹⁷

Here the evidence of the decoy and the clerk are in direct opposition to each other. The owner was not able to provide the security camera tapes which he claimed would corroborate the clerk's statements. He was also unable to produce the clerk whose direct testimony would have carried more weight than the owner's paraphrasing of the clerk's words. The owner's testimony about the clerk's language difficulty, the fact that the clerk was a non-smoker, and his recounting of what he saw on the tapes seemed sincere and credible.

Likewise, the Inspector's testimony was credible and she had no reason to falsify the events. Her eyewitness testimony that a partially smoked, lit cigarette was behind

¹⁷ Minn. R. 1400.7300, subp. 1.

the counter and her contemporaneous documentation of the decoy's allegation that he saw the cigarette in the clerk's mouth must prevail over the paucity of the Licensee's evidence.

The fine for this offense seems harsh under the circumstances, but is within the matrix set by the city council and is not unreasonable.

R. R. K.